to the High Court. The High Court will then take cognisance of the matter.

In my opinion this is clearly a dispute regarding the election of officers. Before the plaintiff can say that the resolution passed on 18th July, 1971, is invalid he must come to court for a declaration that it is so. Before this court can make a declaration it must be empowered to adjudicate over the matter. That brings me to defendants' argument that this court has no jurisdiction. Before this court can have jurisdiction over the matter the procedure for resolving a dispute as prescribed in Part VI must be exhausted and the only way in which this court can have jurisdiction over the matter is by way of a case stated under the provisions of section 45 of the Trade Union Ordinance. In my view this case exemplifies the principle that when a statute creates an obligation and enforces the performance in a specified manner, that performance cannot be enforced in any other manner.

I would allow the application with costs. Although the application gives the defendant union their whole remedy before the action is tried, that should be so since the plaintiff has no cause of action.

Application allowed.

Solicitors: *Athinahappan & Co.; Braddell & Ramani.*

WONG LOK KHIAM v. DATO PETER LO SU YIN & ORS. (NO. 2)

[O.C.J. (B.T.H. Lee J.) January 7, 1972]

[Kota Kinabalu — Notice of Motion No. 3 of 1971]

Practice and Procedure — Injunction — Interim injunction — Dissolution of — Matters to be considered by the court.

Societies — Election — Interim injunction to restrain newly elected office bearers — To keep matters in status quo.

This was an application to dissolve the *ex parte* interim injunction dated October 18, 1971 granted by the Chief Justice of Borneo to restrain the defendants by themselves their agents and servants or otherwise from acting as the newly elected office bearers and delegates of the Sabah Chinese Association and from taking control of the headquarters of the Sabah Chinese Association and from taking possession of any documents, papers or files belonging to the association. On November 15, 1971, Seah J. granted the plaintiff an extension of the interim injunction until trial of the suit ([1972] 1 M.L.J. 138). In his ruling Seah J. *inter alia* said:

> "The Notice of Motion No. 3 of 1971 to discharge the said interim injunction remains on the cause list and has not been struck out or dismissed. He and the other defendants named herein are at liberty to come before the court with a fresh motion on another day when counsel for the defendant is ready to proceed with the hearing of the case".

Held, dismissing the application: as Seah J. had ruled that the defendant should come to court with a fresh motion, therefore the defendants should apply by a new motion to discharge the interim injunction.

Per curiam: The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights the court does not issue the injunction (in this case that the interim injunction should continue) unless it is thoroughly satisfied that there is a strong *prima facie* case in favour of the plaintiff. Where the question is of an election to an office it is not merely the parties that are interested in it but the members of the association are also interested in seeing that proper persons are put in office to conduct and to control the affairs of the association. An injunction should be issued in such cases only when the court is so clearly satisfied about the merits of the plaintiff's claim that it thinks that in all probability the plaintiff will succeed.

Cases referred to:-

(1) *Harman Pictures, N.V.* v. *Osborne & Ors.* [1967] 1 W.L.R. 723.

(2) *Donmar Productions Ltd.* v. *Bart & Ors.* [1967] 1 W.L.R. 740.

NOTICE OF MOTION.

Lim Kean Chye (*W. K. Loo* with him) for the applicant/plaintiff.

Dato' Eusoffe Abdoolcader (*Nicholas Fung* with him) for the respondents/defendants.

B. T. H. Lee J.: This is an application to dissolve the *ex parte* interim injunction dated 18th October, 1971, granted by the Chief Justice of the High Court of Borneo to restrain the above defendants by themselves, their agents and servants or otherwise from acting in the capacity as the newly elected office bearers and delegates of the Sabah Chinese Association (which I shall call "association") and from taking control of the headquarters of Sabah Chinese Association at No. 6, Beach Street, 1st Floor, Kota Kinabalu. and from taking possession of any documents, papers or files belonging to the association and to keep matters in *status quo* prior to the meeting convened by its President, Dato' Peter Lo Su Yin on the 16th October, 1971, until the 15th November, 1971.

By notice of motion filed by the plaintiff dated 4th November, 1971, the interim injunction granted on the 18th October, 1971 was extended until trial of Civil Suit No. 340 of 1971, by Seah J. on 15th November, 1971.

I have been addressed at great length by learned counsel for the parties on the question of *prima facie* case, balance of convenience, irreparable injury, damages, protection of alleged right or interest and also the question of maintenance and preservation of the *status quo* pending the trial.

It is, I think, unnecessary to state again the principles which have to be kept in mind in granting or refusing to grant the application.

These principles have been stated and restated in several decisions and I need only refer to the most recent cases of the English Court of Appeal, notably *Harman Pictures, N.V.* v. *Osborne & Ors.*(1) and *Donmar Productions Ltd.* v. *Bart & Ors.*(2).

Guidance is also to be found in *Kerr* on Injunctions (6th Edition) page 2, which reads as follows: —

> "The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters in *status quo* until the hearing or further order. In interfering by interlocutory injunction, the court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial

question to be tried, and that till the question is ripe for trial, a case has been made out for the preservation of the property in the meantime in *status quo*. A man who comes to the court for an interlocutory injunction, is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the court that the property should be preserved in its present actual condition, until such question can be disposed of."

and also at page 15:

"In exercising the jurisdiction, the court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the court for the protection of the property in question until the legal right can be ascertained. The office of the court to interfere being founded on the existence of the legal right, a man who seeks the aid of the court must be able to show a fair *prima facie* case in support of the title which he asserts. He is not required to make out a clear legal title, but he must satisfy the court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent. The court must, before disturbing any man's legal right, or stripping him of any of the rights with which the law has clothed him, be satisfied that the probability is in favour of the case ultimately failing in the final issue of the suit. The mere existence of a doubt as to the plaintiff's right to the property, interference with which he seeks to restrain, does not of itself constitute a sufficient ground for refusing an injunction, though it is always a circumstance which calls for the attention of the court."

The court has been taken through the numerous affidavits filed by both parties and the relevant provisions of the association's constitution.

It is to be pointed out at the very outset that I desist from expressing any opinion on the questions mooted before me which is properly a matter for the trial judge.

The court has to decide whether it is proper and equitable for the injunction to continue, and the onus is on the plaintiff to show that the interim injunction should continue.

Whether an injunction should continue or not in a particular case is a question left entirely to the discretion of the court and such discretion is to be applied in a *bona fide* and reasonable way by taking into account and giving proper weight to the various matters and not arbitrarily or capriciously.

I have therefore to confine myself strictly to that which appears upon the affidavits and the documents and leave the ultimate question between the parties to be decided on the evidence to be called at the trial.

The court has to take care not to destroy the right of either party. The defendant has quite as much right to claim the exercise of this care as the plaintiff has. And to do that which the court is satisfied would not be an injustice to one or other of the parties.

In deciding whether a strong *prima facie* case has been made out or not, the court must be satisfied upon the materials placed before it that what the plaintiff says is probably true.

The court will not be deciding the matter finally at this stage but still the granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the court does not issue the injunction (in this case that the interim injunction should continue) unless it is thoroughly satisfied that there is a strong *prima facie* case in favour of the plaintiff.

As regards the balance of convenience in a matter of this kind, the convenience not only of the parties to the suit, but also the members of the association has to be considered.

Where the question is of an election to an office it is not merely the parties that are interested in it but the members of the association are also interested in seeing that proper persons are put in office to conduct and to control the affairs of the association.

I have to consider this matter on the basis of the materials so far available, and in my judgment it is better in a case of this kind that the interim injunction ought to continue, because if the plaintiff's suit fails and the injunction is continued the only result will be that the defendant and the newly elected office bearers and committee members will be prevented from exercising their rights as such members for some time. If however the injunction is set aside and ultimately the plaintiff's suit succeeds, the result would be that. with the help of the court the defendant and the elected office bearers who ought not to have been allowed to function is allowed to continue in office and to exercise the powers vested in them. The latter alternative is certainly worse than the former.

An injunction should be issued in such cases only when the court is so clearly satisfied about the merits of the plaintiff's claim that it thinks that in all probability the plaintiff will succeed.

Having considered the matter carefully from every point of view and bearing in mind the principles governing the grant or refusal of such an application I am not at all satisfied upon the authorities referred to and arguments addressed to me that the interim injunction ought to be set aside.

There remains finally a matter which falls for consideration. I refer to that part of Seah J's ruling in Notice of Motion No. 2 of 1971 (Kota Kinabalu Civil Suit No. 340 of 1971) where the learned judge said at page 3:

"The Notice of Motion No. 3 of 1971 to discharge the said interim injunction remains on the cause list and has not been struck out or dismissed. He and the other defendants named herein are at liberty to come before the court with a fresh motion on another day when counsel for the defendant is ready to proceed with the hearing of the case."

There are in fact two orders the first made on 18th October, 1971 and the second made on 15th November, 1971. The order of 15th November, 1971 was made coupled with a ruling. According to the ruling a fresh motion is necessary. It follows that the order of 1st October, 1971 does not exist any more.

It was also submitted that the defendants can do one of two things. If they are not satisfied with the

ruling it is for them to appeal against the ruling, or file a fresh motion as directed by the judge.

In my judgment it is impossible to read the ruling without seeing that the court expressly said:

(i) that the interim injunction remains on the cause list and has not been struck out or dismissed;

(ii) that the defendants are at liberty to come before the court with a fresh motion on another day

I must say I cannot find in the ruling given by the learned judge any justification for reading it in the manner for which the defendants claimed. In my view the plain words of that ruling are too clear to permit any doubt and I find myself in agreement with the submissions of the counsel for the plaintiff.

As both counsel have been at pains to make it clear in their arguments there will also be an order that the parties get on with the action with proper expedition.

The application of the defendants is accordingly dismissed.

Application dismissed.

ESSO STANDARD MALAYA BHD. v. SOUTHERN CROSS AIRWAYS (MALAYSIA) BHD.

[O.C.J. (Raja Azlan Shah J.) January 10, 1972]

[Kuala Lumpur — Civil Suit No. 985 of 1971]

Practice and Procedure — Action — Claim for goods sold and delivered — Counterclaim for defamation — Whether has any material affinity with subject matter of claim — Striking out — R.S.C. 1957, O. 21, r. 15.

Practice and Procedure — Summary judgment — Claim for goods sold and delivered — Construction of documents — No triable issues — R.S.C., 1957, O. 14.

Contract — Construction — Credit card arrangement — Whether binding — Whether subject to execution of formal contract.

This was an application for summary judgment under R.S.C. Order 14. The plaintiffs claimed a sum of $704,762.51 for the sale and supply of aviation fuel to an aircraft, belonging to the defendants, at various airports, including Kuala Lumpur, for the period between June 1971 and September 1971.

On November 25, 1971, the plaintiffs filed their statement of claim, and simultaneously applied for and obtained an order of attachment, before judgment, against the defendants' aircraft. On November 27, 1971, the said order was set aside, and this formed the subject matter of a counterclaim for defamation against the plaintiffs.

The defendants admitted that the fuel was supplied, but denied all liabilities. They contended that they were liable to pay at the price thereof, *ab initio*, to be fixed when a formal contract came to be made and executed on or about two weeks from then.

Prior to the establishment of a proposed formal contract, the arrangement arrived at between the parties was contained in three letters and five credit cards.

Thus, the court had to construe, *inter alia*, the meaning of the three letters to determine the nature of the arrangement arrived at between the parties.

Held, allowing the application: (1) there were no triable issues. This was simply a case of construction of certain documents which passed between the parties;

(2) the counterclaim was to form the subject matter of a separate action. It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Thus, a counterclaim for libel cannot be maintained in a claim for money lent;

(3) there was an immediate binding contract based on the credit card arrangement. The letters were not expressed in such a way as to show clearly that the execution of a formal contract was made a condition precedent to the existence of a binding arrangement. There were no words appropriate for introducing a condition or stipulation.

Per Raja Azlan Shah J.: "It is, I think, right that an order under Order 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court, on summary application, should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed."

[Editorial Note: The defendants withdrew their appeals in the Federal Court (Federal Court Civil Appeal Nos. 124 and 125 of 1971). Ong C.J., Gill and Ali F.JJ. struck out the appeals and awarded costs of the appeal to the respondents/plaintiffs.]

Cases referred to:-

(1) *High Commissioner for India & Ors.* v. *Ghosh* [1959] 3 W.L.R. 811.

(2) *Shanghai Hall Ltd.* v. *Townhouse Hotel Ltd.* [1967] 1 M.L.J. 223.

(3) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284 at p. 258.

(4) *Chillingworth* v. *Esche* [1924] 1 Ch. 97.

CIVIL SUIT.

.....

.....

Raja Azlan Shah J.: This is an application for summary judgment under R.S.C. Order 14. The plaintiffs claim a sum of $704,762.51 against the defendants for the sale and supply of turbo fuel to their aircraft, Boeing 707, Registration No. 9M-AQD at various airports — Nairobi, Plaisance, Zaventem, Gatwick, Subang, Karachi, Essanboga, Luxemburg, Bangkok and Athens — for the period between June 1971 and September 1971. The particulars are annexed to the statement of claim which was filed on November 25, 1971.

On the same day the plaintiffs applied for and obtained an order of attachment before judgment against the said aircraft. The said order was set aside on November 27, 1971. This now forms the subject matter of a counterclaim for defamation against the plaintiffs.

The defendants filed their statement of defence on December 8, 1971. Save that the supply of fuel is admitted, the defendants deny all liabilities. The forefront of their defence is that they agreed to accept the supply of fuel by the plaintiffs upon their promise and undertaking that the price thereof *ab initio* would be fixed and adjusted when a formal contract is executed. They say that on the faith of that